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NO. 84-221

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ROBERT E. HENSHAW and SHELEEN HENSHAW, his wife, DEAN R. SPIRO and VIRGINIA M. SPIRO, his wife, ROBERT C. CUCHERAN and NOLA CUCHERAN, his wife, RICHARD D. STAMM and CAROL A. STAMM, his wife, ROLF O. YOUNG and ALYCE M. YOUNG, his wife, and EARL G. SMITH, JR. and FLORENCE M. SMITH, his wife,

Appellants,

vs.

STATE TAX COMMISSION OF THE STATE OF MICHIGAN, THE COUNTY OF MACOMB, THE TOWNSHIP OF SHELBY, and THE CITY OF STERLING HEIGHTS,

Appellees.

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

MOTION TO DISMISS APPEAL AND

BRIEF IN SUPPORT OF MOTION

PAUL J. O'REILLY (P 18517)
STEWART, O'REILLY, LASCOE & RANCILIO, P.C.
Attorneys for Appellee City of Sterling Heights
40600 Van Dyke Avenue
Sterling Heights, Michigan 48078
(313) 268-9660

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MOTION TO DISMISS APPEAL

NOW COMES the Appellee, CITY OF STERLING HEIGHTS, by and through its attorneys, STEWART, O'REILLY, LASCOE & RANCILIO, P.C., and for its Motion To Dismiss Appeal pursuant to Supreme Court Rule 16.1(b) states the following:

1. The facts of this case have previously been stipulated to by all parties and are set forth in Appellants' Jurisdictional Statement.

2. For purposes of this Motion and Supporting Brief, Appellee CITY OF STERLING HEIGHTS accepts the facts as stated in Appellants' Jurisdictional Statement as correct.

3. The question presented in this case is whether Appellant taxpayers were denied due process of law pursuant to the Fourteenth Amendment of the Constitution when they were individually afforded no notice or opportunity to be heard in State property tax equalization proceedings, but

were represented by their elected public officials in those proceedings.

4. The question presented in this case has been explicitly answered by a decision of this Court so as to leave no room for real controversy.

5. Since the question presented has been explicitly answered by this Court, the present appeal is devoid of a substantial federal question.

WHEREFORE, the Appellee, CITY OF STERLING HEIGHTS, requests that this Honorable Court dismiss the appeal in the above-referenced cause of action pursuant to Supreme Court Rule 16.1(b) as the appeal does not present a substantial federal question.

STEWART, O'REILLY, LASCOE & RANCILIO, P.C.

By: _____
PAUL J. O'REILLY (P 18517)
Attorneys for Appellee City of Sterling Heights
40600 Van Dyke Avenue
Sterling Heights, MI 48078
(313) 268-9660

STATEMENT OF FACTS

For purposes of this Motion and Supporting Brief, Appellee, City of Sterling Heights, accepts the facts as stated in Appellants' Jurisdictional Statement as correct.

QUESTION PRESENTED

WHETHER APPELLANT TAXPAYERS WERE DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION WHERE THEY WERE NOT GIVEN INDIVIDUAL NOTICE OR OPPORTUNITY TO BE HEARD IN STATE PROPERTY TAX EQUALIZATION PROCEEDINGS, BUT WERE REPRESENTED BY THEIR ELECTED PUBLIC OFFICIALS IN THOSE PROCEEDINGS.

The Michigan Court of Appeals has answered this question "NO".

The Appellee City of Sterling Heights answers this question "NO".

The Appellants answer this question "YES".

I.

THE QUESTION INVOLVED IS NOT SUBSTANTIAL

The question presented in the instant case has been addressed and explicitly answered by a decision of this Court so as to leave no room for real controversy. The appeal of this cause therefore lacks a substantial federal question and should be dismissed. Equitable Life Assurance Society v. Brown, 187 US 308, 23 S Ct 123 (1902).

A. Because state equalization is a quasi-legislative process which affects a large number of persons, due process does not require that individual taxpayers be given notice and an opportunity to be heard.

This Honorable Court established long ago the principle that state equalization procedures do not violate due process of law simply because individual taxpayers are not afforded an opportunity to be heard

Bi-Metallic Investment Company v. State Board of Equalization, 239 US 441 (1915). One of the basic questions presented in the instant case is whether the rule of law announced in Bi-Metallic comports with current notions of due process. Appellants argue that recent developments have rendered the holding in Bi-Metallic obsolete. They, therefore, urge this Court to overrule that longstanding precedent. Appellee City of Sterling Heights strongly disagrees. Appellee argues that the holding in Bi-Metallic remains constitutionally sound, and that the present appeal should be dismissed under the principle of stare decisis.

Bi-Metallic involved a challenge of state equalization in Colorado after the valuation of taxable property was increased some forty (40%) percent. The complaint alleged that the equalization procedure

denied individual taxpayers due process of law because they were given no opportunity to be heard. In dismissing the complaint and affirming the decision below, the Court opined:

> "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule."

The Court then drew a distinction between Bi-Metallic and the case of Londoner v. Denver, 210 US 373 (1908). In Londoner, the Court held that where only a small number of persons would be affected by a special tax levy for paving a street,

those persons had a right to a hearing. The Court pointed out that whereas the decision in Londoner was made on individual grounds, Bi-Metallic involved a "general determination dealing only with the principle upon which all the assessments in a county had been laid." Bi-Metallic, 239 US at 375.

Londoner and Bi-Metallic, supra, were the forerunners of the present day distinction in the Michigan Administrative Procedures Act of 1969 [MCLA 24.201 - 24.315] between adjudicatory and leglislative fact finding. In a factually inapposite case, Justice Levin of the Michigan Supreme Court explained the distinction as follows:

> "Whether official action is legislative or administrative depends on the nature of the decision and the process by which it is reached as well as the governmental authority that makes the decision.

> "When action is based on general grounds, the decision is ordinarily legislative. When it is based on individual grounds, it is ordinarily administrative.
>
> "When legislative, the governmental authority can act without a hearing and judicial review is limited to an inquiry whether the action is irrational (and thus a denial of substantive due process) or violates some other constitutional limitation.
>
> "When based on individual grounds--when administrative--there must be a hearing and the inquiry on review, under the Michigan Constitution, is whether the decision is 'supported by competent, material and substantial evidence on the whole record.'"

Kropf v. Sterling Heights, 391 Mich 139, 215 NW2d 179 (1974), citing Bi-Metallic, supra. For a more detailed explanation, See 1 Davis, Administrative Law Treatise, Section 7.04.

Procedural due process protections of notice and an opportunity to be heard apply only to "contested cases" determining legal

rights, duties, or privileges of named parties. MCLA 24.203(3). Since there are no adversaries when the State Board of Equalization adjusts valuations on an intercounty basis, the provisions of the Administrative Procedures Act do not apply. Emmet County v. State Tax Commission, 397 Mich 550, 244 NW 2d 909 (1976). State equalization does not consider individual property valuations, but instead assures that valuations throughout the counties are uniform. Allied Supermarkets, Inc. v. Detroit, 391 Mich 460, 216 NW 2d 755 (1974). The determination regarding intercounty equalization is based on general grounds and applied to all taxpayers. Thus, the determination of the Michigan State Tax Commission is quasi-legislative in nature and requires no notice or hearing for individual taxpayers. Bi-Metallic, supra.

As for the recent developments which allegedly dictate the overruling of Bi-Metallic, it seems clear that the cases cited by the Appellants are not on point. The case of Mennonite Board of Missions v. Adams, ___US___, 103 S Ct ___, 77 L Ed 2d 180 (1983) is inapposite because it deals with state determinations based on individual rather than general grounds. The Court in Mennonite Board of Missions held that an Indiana tax sale statute denied a mortgagee due process of law by not giving it adequate notice of the sale of the mortgaged property. Appellee contends that Mennonite Board of Missions is consistent with the holding in Bi-Metallic. The determination to sell an individuals property for delinquent taxes is like the determination made in Londoner: in both instances, a relatively small number of individuals were exceptionally affected

upon individual grounds. Therefore, as was the case in Londoner, the local authority was required to notify the parties affected by the decision and allow them to be heard. This result is both consistent with and comtemplated by the decision in Bi-Metallic.

The case of Mullane v. Central Hanover Bank and Trust Co., 339 US 306, (1950) is also inapposite. The question presented in Mullane was whether the notice given to trust fund beneficiaries on a judicial settlement of accounts by the trustee was adequate, while the question presented in the instant case is whether individual taxpayers are entitled to any notice or opportunity to be heard in state equalization proceedings. Appellee contends that adequate notice was given to the county as the representative of all county taxpayers, but that under the authority of Bi-Metallic,

individual taxpayers need not be notified. In short, Mullane did nothing to change the distinction between legislative and administrative determinations and the due process requirements respecting each of those determinations.

This position is reinforced by the Court's more recent holding in United States v. Florida East Coast Railway Co., 410 US 224 (1973). In that case, the Court stated that later decisions have continued to observe the distinction adverted to in Bi-Metallic and Londoner. Justice Rhenquist asserted that, though the line dividing these two types of cases is not always easy to descern, these later decisions represent a recognized distinction in administrative law. Since the theory of due process set forth in Bi-Metallic continues to be acknowledged as constitutionally valid, the Appellants challenge

to intercounty equalization procedures in Michigan must fail.

B. All individual taxpayers are represented by their elected county officials throughout the state equalization process.

Individual taxpayers are represented throughout the intercounty equalization process by elected county officials. Each county is given the opportunity to be heard before the State Tax Commission regarding equalization. MCLA 209.7; MSA 7.604. Likewise, it is the county which may seek judicial review of equalization determinations in the case of fraud or error of law. Emmet, supra.

Appellants argue, however, that county representation for the tax year 1975 was inadequate since there was no substantial identity of interest between individual taxpayers and Macomb County. Appellants contend that the county stood to gain tax

revenue from the State Tax Commissions increase of land valuations, and therefore was incapable of adequately representing individual taxpayers, including the appellants.

The facts in the case at bar show rather conclusively that Appellants claim of inadequate representation is without substance. Macomb County filed applications for leave to appeal with the Michigan Court of Appeals (Docket No. 30760) and the Michigan Supreme Court (Docket No. 19325) asserting that the State Tax Commission's intercounty equalization for 1975 unlawfully increased the county's assessed valuation by 14.6 percent. Both of those applications were denied. The county and local units of government then decided not to collect the increased tax liability. The increased tax was finally levied in late 1977 and early 1978, but only after

Macomb County had been brought to court by the Chippewa Valley School District and an order was entered directing the county to levy the tax. Clearly, these facts prove that Macomb County was opposed to any valuation increase, and exhausted all available remedies in the interest of avoiding increased property taxes.

Any remaining doubt as to the identity of interest between a county and its taxpayers was removed by 1975 PA 243 [MCLA 211.34] which first took effect in the 1976 tax year. Under this Act, a county can no longer gain tax revenue by inter-county equalization since it must reduce millage rates commensurate with any tax increase due to a higher valuation. In light of this statutory modification, as well as the various actions taken by Macomb County on behalf of its taxpayers,

the Appellants should not be heard to complain of inadequate representation.

C. Individual taxpayers may challenge their assessments both before and after equalization occurs.

Even though the county is the proper party to challenge the determinations of the State Board of Equalization, the individual taxpayer is not precluded from raising his voice in dissent. If the property owner believes that his property is valued disproportionately to the valuation of the other properties in the assessment district, he may contest the valuation before the local board of review, MCLA 211.29, after receiving notice of any increase and the tentative SEV, MCLA 211.24c. The taxpayer is also afforded the opportunity to appeal to the State Tax Tribunal if the board renders an adverse decision, MCLA 205.735. These rights are fully explained when the taxpayer receives

notice of the board's disposition, MCLA 211.30(2).

For the 1975 tax year, an individual taxpayer could appeal directly to the Tax Tribunal if he believed his assessment to be more than 50% of the true cash value, MCLA 211.34a(2). Even after intercounty equalization occurs, an individual taxpayer can appear before the State Tax Tribunal to challenge the propriety of his assessment although he had not sought review of the original assessment. Brittany Park Apartments v. Harrison Township, 104 Mich App 81, 304 NW 2d 488 (1981). Given these opportunities for individual appeal of equalization determinations, and considering the fact that all taxpayers are represented by the county throughout the equalization process, the Court should find no violation of due process and dismiss the present appeal.

CONCLUSION

As the question presented in this case has been explicitly answered by a decision of this Court, the present appeal should be dismissed for lack of a substantial federal question pursuant to Supreme Court Rule 16.1(b).

Respectfully Submitted,

STEWART, O'REILLY, LASCOE & RANCILIO, P.C.

By:_____
PAUL J. O'REILLY (P 18517)
Attorneys for Appellee City of Sterling Heights
40600 Van Dyke Avenue
Sterling Heights, MI 48078
(313) 268-9660

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